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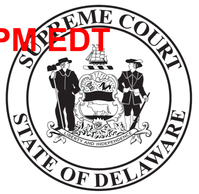

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE HONORABLE ANTHONY J. ALBENCE, in his official capacity as State Election Commissioner, and STATE OF DELAWARE DEPARTMENT OF ELECTIONS,	)	No. 120, 2024
Defendants / Appellants,	)	On Appeal from a Decision of the Superior Court for the State of Delaware
v.	)	C.A. No. S23C-03-014 MHC
MICHAEL MENNELLA and THE HONORABLE GERLAD W. HOCKER	)	
Plaintiffs-Appellees.	)	

APPELLEES' ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

This case concerns the constitutionality of two Delaware laws: Delaware's Early Voting Laws, 15 *Del. C.* § 5402 *et seq*., and Delaware's Permanent Absentee Voting Law, 15 *Del. C.* §§ 5502, 5503(k)(2). This case does not ask the Court to express an opinion on the propriety of early voting or a permanent absentee voter list. Rather, the narrow question before this Court is whether the Superior Court correctly held that the challenged laws conflict with the Delaware Constitution. For the reasons stated herein, this Court should answer "yes" to that question.

Appellees are Michael Mennella ("Mennella"), a registered voter and veteran election inspector, and Gerald W. Hocker ("Hocker"), a registered voter and elected officer holder who currently represents Delaware's 20th Senate District (together, "Plaintiffs"). Mennella initially filed this challenge in Chancery Court in February 2022, naming as defendants State Elections Commissioner Anthony J. Albence and the Delaware Department of Elections (together, "the Department"). The case was later dismissed for lack of jurisdiction and Mennella transferred the matter to Superior Court, where he filed the Amended Complaint in June 2023, which added Hocker as a plaintiff. S*ee* A010.

The Superior Court denied the Department's motion to dismiss and granted Plaintiffs a judgment declaring that the Early Voting Laws and the Permanent Absentee Voting Law are invalid because they conflict with the Delaware

Constitution. *See* Opinion and Order, February 23, 2024, attached as Exhibit A to the Department's Opening Brief ("Exh. A").[1]

Before the Superior Court, the Department argued that Plaintiffs did not properly transfer this case to Superior Court and that Plaintiffs claims were time-barred and waived. *See* Exh. A at 2. The Department does not raise those arguments before this Court, and they are therefore waived.

The Department seeks review of the Superior Court's rulings on standing and the constitutionality of the Early Voting Laws and the Permanent Absentee Voting Law.

[1] Plaintiffs requested a declaratory judgment in their Amended Complaint, *see* A026, and in their response to the Department's Motion to Dismiss, *see* A099-0101.

SUMMARY OF THE ARGUMENT

Answer to the Department's Summary of Arguments

1. Denied. The Superior Court correctly held that Plaintiff Hocker has standing to challenge both laws. Furthermore, both Hocker and Mennella adequately alleged concrete harm and met the standing requirements for both legal challenges.

2. Denied. The Early Voting Laws conflict with Article V, Section 1 of the Delaware Constitution because they expand Election Day beyond its Constitutionally designated day. As the Superior Court found, *Foster v. Love*, 522 U.S. 67 (1997) does not control the original meaning of the Delaware Constitution. While the General Assembly enjoys broad legislative authority, it may not use that authority to pass a statute that directly contravenes the Delaware Constitution.

3. Denied. The Permanent Absentee Voting Law conflicts with Article V, Section 4A of the Delaware Constitution because it grants absentee voting eligibility in perpetuity, without consideration of the applicant's eligibility at each General Election, as the Constitution requires. The General Assembly does not have authority to grant absentee voting privileges based on the mere *presumption* of eligibility, as the Department claims.

Mennella's and Hocker's Summary of Argument

1. The Superior Court correctly held that Hocker has standing as a candidate under *Albence v. Higgin*, 295 A.3d 1065 (Del. 2022). Exh. A at 4-5.

Hocker currently represents Delaware's 20th Senate District. A012 ¶ 9, A022 ¶ 49. Hocker has more than twenty (20) years of legislative service in the Delaware General Assembly. Exh. A at 5. Hocker intends to campaign for Delaware State Senate in future elections. A012 ¶ 9, A022 ¶ 49. Hocker thus faces the concrete and particularized injuries articulated in *Higgin*—namely, the "risk of defeat" and "inaccurate vote tally" caused by "the casting and counting of legally invalid ballots." *Higgin*, 295 A.3d at 1087. The Department's erroneously rigid view of *Higgin* contravenes this Court's standing precedent.

2. Mennella has standing to pursue his claims because he alleges cognizable injuries in his capacity as an election inspector. Mennella alleges an intent to serve at the 2024 General Election and at other future elections. A012 ¶ 8, A022 ¶ 48. Absent relief, the 2024 General Election will be conducted using early voting sites. At those sites, Mennella will be forced to choose between his official duties and the Delaware Constitution. If Mennella refuses to administer the election at early voting sites—because he believes such sites to be unlawful—he faces fines and even prison time, 15 *Del. C.* § 5126; 15 *Del. C.* § 5112, cognizable injuries traceable to the Early Voting Laws. His injuries are self-evident.

3. Hocker and Mennella separately have standing in their capacity as registered voters because they face the same concrete and particularized voting-related injuries that the Chancery Court found sufficient to support standing in

Higgin v. Albence, Nos. 2022-0641-NAC, 2022-0644-NAC, 2022 Del. Ch. LEXIS 232, at *28 (Del. Ch. Sep. 14, 2022) ("[I]njuries to fundamental rights—*e.g.*, voting—even when shared, may be sufficiently particular and concrete to confer standing on an individual voter."). The Chancery Court rejected the same argument that the Department again makes here—that Plaintiffs' voting-related injuries are not particularized: "Plaintiffs' injuries are not generalized" because "[t]he harm to voters who do comply with the requirements for voting under the Delaware Constitution is distinct from the harm to voters who do not. The harm may be shared by all the members of the compliant group, but it is no less personal to each group member." *Id*. at *28. This holding is consistent with this Court's decision in *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103 (Del. 2003).

4. The Superior Court correctly held that the Early Voting Laws clearly and convincingly conflict with Article V, Section 1 of the Delaware Constitution. The unmistakable lesson of *Higgin* and this Court's other decisions is that the Delaware Constitution must be read to "mean[] what it plainly says, no matter what the effect may be." *State ex rel. Southerland v. Hart*, 129 A. 691, 694 (Del. 1925). In the Superior Court's words, "The conflict between these two passages is obvious. Our Constitution enumerates the one day an election shall be held biennially and the Early Voting Statute allows for voting at least 10 days before that date." Exh. A at

16. The Delaware Constitution's plain text, as well as historical context and logic, support the Superior Court's holding.

The Department's entire counterargument depends on an inapt decision involving federal Election Day statutes, *Foster v. Love*, 522 U.S. 67 (1997). *Foster*—which *invalidated* an early voting scheme—cannot be authoritative on an issue it did not address—the meaning of Delaware's Constitution.

The Department's reliance on the legitimacy of absentee voting, generally, undermines its arguments. Absentee voting is authorized by *constitutional amendment*. *See* Del. Const. Art. V, § 4A. Early voting is authorized by *statute*. Clearly, changes to in-person voting on Election Day must be made through the constitutional amendment process.

Altering *when* voting occurs is not within the General Assembly's constitutional power to "prescribe the means, methods and instruments of voting." Del. Const. Art. V, § 1. Doing the same act at a different time does not change the mean or method of the act. The General Assembly may change the means and method of voting. It may not change the time when voting occurs.

Plaintiffs disagree with the Superior Court's determination that early voting is a "manner" of voting. *See* Exh. A at 19. Similar language has largely been meant to reflect voting by paper ballot or voting machine, in person or by absentee ballot. Each early voting day is conducted in the same manner with the same protocols as

on the day of the General Election. It is thus identical in manner, just at a different time.

It is clear from the repeated and consistent enactment, through multiple revisions of the relevant sections of the Constitution, that the retention of a single designated day for voting in the General Election was intentional and purposeful. Prior legislatures clearly felt that in-person voting on a specific day, with limited exceptions for absentee voting was "best to secure secrecy and the independence of the voter, preserve the freedom and purity of elections and prevent fraud, corruption and intimidation thereat." Del. Const. Art. V, § 1. Indeed, for centuries, the Delaware Constitution's drafters have singled out one specific day for Election Day. If "freedom" and "purity" are interpreted to authorize a change in the *time* when voting occurs, as the Department contends, then this very considered limitation will have no logical limits. The Superior Court correctly declined to extend this power indefinitely.

5. The Superior Court correctly held that the Permanent Absentee Voting Law clearly and convincingly conflicts with Article V, Section 4A of the Delaware Constitution. The Permanent Absentee Voting Law grants absentee voting privileges indefinitely, without consideration of the applicant's eligibility at each election. In effect, the General Assembly has enlarged the pool of eligible absentee voters, in contravention of the Constitution and this Court's precedent, including *Higgin*.

Indeed, the General Assembly may provide for absentee voting only by those who "*shall* be unable to appear … at the regular polling place." Del. Const. Art. V, § 4A. "Shall" is a term of certainty, used in laws and regulations to express what is mandatory. The Department concedes that the Permanent Absentee Voting Law works on a *presumption* of absentee voting eligibility, Department Br. at 36, not confirmation of the same, which confirms the Law's invalidity.

STATEMENT OF FACTS

I. Plaintiffs Mennella and Hocker

A. Election Inspector Michael Mennella

Plaintiff Michael Mennella is a registered Delaware voter. A012 ¶ 8. Mennella has served as an inspector of elections for the Delaware Department of Elections in at least eight elections during the last five to six years. *Id*. Mennella plans to serve as an inspector of elections at the 2024 General Election and at other future elections. *Id*.

The "inspector of elections" is an "election officer" appointed by the Department of Elections. 15 *Del. C.* § 4702; 15 *Del. C.* § 101(9). The Delaware Code sets forth Mennella's duties and responsibilities. Of primary importance is Mennella's responsibility for preparing his polling place for the election and declaring it open for voting. 15 *Del. C.* § 4912; 15 *Del. C.* § 4931.

Before opening the election, Mennella must swear to an oath that he will not receive any vote of a person he "believes" is not entitled to vote and to otherwise conduct an election of good integrity. *See* 15 *Del. C.* § 4904. Mennella is authorized to determine voter eligibility in his polling place and to hear voter challenges. *See* 15 *Del. C.* § 4938 and 15 *Del. C.* § 4937(c).

Mennella may be fined $300 to $500 or *imprisoned* for up to 3 years if he "wilfully violates [Title 15] in the performance of any duty imposed upon him[.]" 15 *Del. C.* § 5126.

B. Senator Gerald W. Hocker

The Honorable Gerald W. Hocker is a registered voter, resident of the State of Delaware, and member of the Delaware Senate. A012 ¶ 9. Hocker currently represents Delaware's 20th Senate District. A012 ¶ 9, A022 ¶ 49. Hocker has more than twenty (20) years of legislative service in the Delaware General Assembly. Exh. A at 5. Hocker intends to run again for State Senate in future elections. *Id*. Hocker wants a fair election and all votes made and tabulated in his race to be done so in accordance with the law, including the Delaware Constitution. A012 ¶ 9, A022-23 ¶¶ 50-51.

II. The Early Voting Laws

In 2019, the Delaware General Assembly passed, and the Governor signed, legislation that permits voters to cast ballots in person during at least the ten (10) days before election day, starting in 2022. HB 38, 150th Gen. Assemb., Reg. Sess. (2019-2020); 15 *Del. C.* § 5402, *et seq*. (effective Jan. 1, 2022) ("Early Voting Laws"). The procedure for early voting is, as the Department concedes, conducted in the same way as voting on Election Day. A046 (citing 15 *Del. C.* § 5405).

Early voting took place in February 2022, and was most recently used for the November 2022 General Election. A047.

III. Permanent Absentee Voting Law

The Constitution of Delaware allows for absentee voting, with strict restrictions. It provides:

> [A]ny qualified elector of this State, duly registered, who shall be unable to appear to cast his or her ballot at any general election at the regular polling place of the election district in which he or she is registered, either because of being in the public service of the United States or of this State, or his or her spouse or dependents when residing with or accompanying him or her[,] because of the nature of his or her business or occupation, because of his or her sickness or physical disability, because of his or her absence from the district while on vacation, or because of the tenets or teachings of his or her religion, may cast a ballot at such general election to be counted in such election district.

Del. Const. Art. V, § 4A. The Constitution further requires the General Assembly to enact laws that allow voting by absentee ballot in accordance with the Constitution's limits. Del. Const. Art. V, § 4A. Consistently, Delaware statutes provide a list of reasons for which a registrant qualifies to vote by absentee ballot. 15 *Del. C.* § 5502.

The General Assembly has further allowed, by statute, a more limited set of registrants to apply to the Department for "permanent absentee status." 15 *Del. C.* §§ 5502, 5503(k)(2). The Department "automatically send[s] an absentee ballot to each person in permanent absentee status for each election in which the person is

entitled to vote." 15 *Del. C.* § 5503(k). Delaware law does not require the Department to verify whether each permanent absentee voter is eligible to vote in each election. A016 ¶ 22; *see also* Department Brief at 11-12 (explaining that in 2022, the Department "reminded those registrants of…their continuing obligation to inform the Department of any changes to their personal information.").

ANSWERING ARGUMENT ON APPEAL

I. Plaintiff Hocker Has Standing to Challenge the Early Voting Laws and the Permanent Absentee Voting Law.

A. Question Presented

Did the Superior Court correctly hold that Plaintiff Hocker had standing to challenge the Early Voting Laws and the Permanent Absentee Voting Law?

B. Scope of Review

The Supreme Court reviews rulings of law implicating standing *de novo*. *Higgin*, 295 A.3d at 1085. However, the Court has exercised restraint in the review of lower court findings and given deference to findings of fact and law that are supported by the record below. *Rosenbloom v. Esso V.I., Inc.*, 766 A.2d 451, 458 (Del. 2000).

C. Merits of Argument

The Superior Court correctly held that Hocker has standing as a candidate under *Albence v. Higgin*, 295 A.3d 1065 (Del. 2022). Exh. A at 5-6. The Department's arguments to the contrary depend on an erroneously rigid interpretation of *Higgin*, and this Court's standing jurisprudence, generally. The Superior Court's holding should be affirmed.

1. Hocker Has Standing as a Candidate Under *Albence v. Higgin*.

In *Higgin*, a candidate for State Representative and other plaintiffs, challenged Delaware statutes providing for vote-by-mail and same-day registration. *Id*. at 1083-

1084. Higgin asserted "that he is entitled to a fair election, guaranteed by the Delaware Constitution, and votes made and tabulated in violation of the Delaware Constitution are unlawful on their face." *Id.* at 1087 (citations and quotations omitted). He "argue[d] further that 'a fair election' is an election conducted in accordance with the Delaware Constitution …." *Id.*

This Court found that Higgin's "concerns go beyond a claim of voting dilution. They 'strike at the voting right itself' and the tenet that 'only votes legally made—count.'" *Id.* (quoting *Higgin v. Albence*, Nos. 2022-0641-NAC, 2022-0644-NAC, 2022 Del. Ch. LEXIS 232, at *26 (Del. Ch. Sep. 14, 2022)). This Court explained, "It seems nearly self-evident that a candidate who runs the risk of defeat because of the casting of ballots that are the product of an extra-constitutional statute has standing to challenge that statute." *Higgin*, 295 A.3d at 1087. "Simply put," the Court continued, "the casting and counting of legally invalid ballots would necessarily lead to an inaccurate vote tally, which … is a concrete and particularized injury to candidates participating in the affected election." *Id.*

As the Superior Court concluded, *Higgin* compels a finding that Hocker has standing as a candidate in this case. Hocker is an incumbent office holder. A012 ¶ 9; Exh. A at 5. He has campaigned for elected office in Delaware for more than twenty years and was most recently re-elected to his Senate seat in 2022. *See* Exh. A at 5-6. Hocker intends to campaign for Delaware State Senate in future elections.

A012 ¶ 9, A022 ¶ 49; Exh. A at 6. As the Superior Court explained, “I am satisfied that an incumbent State Senator who expressed his intention to seek reelection in a lawsuit, a matter of public record, is in fact a candidate.” Exh. A at 6. There is nothing clearly erroneous about that finding. Hocker therefore faces the concrete and particularized injuries articulated in *Higgin*—namely, the “risk of defeat” and “inaccurate vote tally” caused by “the casting and counting of legally invalid ballots.” *Higgin*, 295 A.3d at 1087. Hocker therefore has standing.

The Department claims that Higgin had standing *only* because he was actively campaigning in the next most proximate election. Department Brief at 17-18. Because Hocker is not campaigning and will not appear on the ballot until 2026, the Department reasons, Hocker does not have standing under *Higgin*. Not so.

While this Court mentioned Higgin’s campaign activities, *Higgin*, 295 A.3d at 1087, those activities ultimately had no connection to the injury this Court identified— the “risk of defeat” and “inaccurate vote tally” caused by “the casting and counting of legally invalid ballots.” *Higgin*, 295 A.3d at 1087. Indeed, a candidate who displays no signs and makes no public appearances faces the same “risk of defeat” as the candidate who travels door to door soliciting votes. Regardless of the intensity of campaigning, or the proximity of the next election, the “risk of defeat” remains the same. “Actively campaigning” is not a requirement for standing under *Higgin*.

Candidacy in the next most proximate election is also not a requirement. The Department seizes on the following footnote to support its claim to the contrary: "This conclusion is dependent upon Higgin's status as an active candidate in the affected election…." *Higgin*, 295 A.3d at 1088 n.157. What the Department does not include in its brief is the rest of the footnote: "… and renders consideration of his and the remaining Plaintiffs' other standing arguments *based on their status as registered voters unnecessary*." *Id.* (emphasis added). This Court was not articulating exacting standards for candidate-standing in all cases, but clarifying that its conclusion was limited to Higgin's status as a candidate and not based on his status as a registered voter.[2]

Nor is such a requirement compelled from this Court's standing jurisprudence, generally. "The term 'standing' refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or to redress a grievance." *Dover Historical Soc'y*, 838 A.2d at 1110. In order to establish standing, "a plaintiff or petitioner must demonstrate first, that he or she sustained an 'injury-in-fact'; and second, that the interests he or she seeks to be protected are within the zone of interests to be protected." *Id.* Public interest standing "permits a suitable plaintiff to raise

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[2] Much like Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," or "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), courts, especially courts of last resort, do not typically hide dispositive standards in footnotes.

constitutional and statutory issues of substantial public importance, whose impact on the law is real, and where the ongoing violations are likely to continue and to evade judicial review." *In Re Del. Pub. Schs. Litig.*, 239 A.3d 451, 512-513 (Del. Ch. 2020).

Furthermore, state court standing doctrine is appropriately more flexible because the state courts play a different and more expansive role than the federal courts. *See In Re Del. Pub. Schs. Litig.,* 239 A.3d at 510 (citing John Dimanno, *Beyond Taxpayers' Suits: Public Interest Standing in the States*, 41 Conn. L. Rev. 639, 658–63 (2008)). State courts draw their power from the original sovereignty of the several states as governments with plenary and unenumerated powers, unlike federal courts. *In Re Del. Pub. Schs. Litig.,* 239 A.3d at 510 (citing *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475-77 (2018); Randy J. Holland, *State Constitutions: Purpose and Function, in The Delaware Constitution of 1897: The First One Hundred Years* 3, 13-14, 14 (Randy J. Holland & Harvey Bernard Rubenstein eds. 1997)). In short, "Delaware's courts may hear cases and controversies that the federal courts cannot." *Higgin*, 295 A.3d at 1086-87.

"The Delaware Constitution contains provisions that illustrate the broader expanse of state court power." *In re Del. Pub. Schs. Litig.*, 239 A.3d at 510-511. Article I, Section 9 provides that "[a]ll courts shall be open; and every person for any injury done him or her in his or her reputation, person, movable or immovable

possessions shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land …." Del. Const., Art. I, § 9. "This provision traces its lineage through Article I, Section 9 of the Delaware Constitution of 1792, to Article 22 of the Delaware Declaration of Rights of 1776, and ultimately to Chapter 40 of Magna Charta." *In re Del. Pub. Schs. Litig.*, 239 A.3d at 510-511 (citing Randy J. Holland, *The Delaware State Constitution* 64–65 (2011); *see also* Maurice A. Hartnett, III, *Delaware's Charters and Prior Constitutions*, *in First One Hundred Years*, *supra*, at 29 ("The Delaware Declaration of Rights, somewhat uniquely, provided a 'remedy at law for any injury.' A similar provision still remains in the Delaware constitution.")).

"Another significant provision is Article I, Section 10, which … was 'intended to establish for the benefit of the people of the state a tribunal to administer the remedies and principles of equity.'" *In re Del. Pub. Schs. Litig.*, 239 A.3d at 511 (citing *Du Pont v. Du Pont*, 85 A.2d 724, 727, 729 (Del. 1951)). The power of a court of equity to hear claims has always been and necessarily remains broad and flexible. "Historically, equity jurisdiction has taken its shape and substance from the perceived inadequacies of the common law and the changing demands of a developing nation." *Id.* (citing *Schoon v. Smith*, 953 A.2d 196, 204 (Del. 2008) (internal quotation marks omitted)).

Delaware Courts "apply the concept of standing as a matter of self-restraint to avoid the rendering of advisory opinions at the behest of parties who are 'mere intermeddlers,'" *Higgin*, 295 A.3d at 1086. A twenty-year office-holder who alleges an intent to seek office again cannot credibly be referred to as a "mere intermeddler[]." *Id.* Hocker's intent to run for Senate again, A012 ¶ 9, A022 ¶ 49; Exh. A at 6, means that absent relief his electoral fate will, with sufficient certainty, be impacted by votes cast under the challenged statutes. There is nothing speculative about this.

Furthermore, this Court explained that its standing conclusion "is consistent with the United States Supreme Court's standing analysis in *Lujan v. Defenders of Wildlife*." *Higgin*, 295 A.3d at 1088. In *Lujan*, the United States Supreme Court stated that "'imminence" is concededly a somewhat elastic concept," but "it cannot be stretched beyond its purpose[.]" *Lujan*, 504 U.S. 555, 564 n.2 (1992). Imminence is so stretched, the Court explained, when "the plaintiff alleges only an injury at *some indefinite future time*[.]" *Id.* (emphasis added). No such allegations are made here. Hocker alleges an intent "to run again *for State Senate* in future elections," the next of which has a definite and known time. The Superior Court's conclusion is thus also consistent with *Lujan*.

The Superior Court held that the challenged statutes are "clearly" unconstitutional. Exh. A at 13. The Department nevertheless asks this Court to allow

those "clearly" unconstitutional practices to continue because Hocker has not yet displayed a campaign sign. Such a rigid and unjust standard would contravene this Court's flexible approach to standing and require the Court to ignore Hocker's stated intent to seek the same office at a known future date.

2. Mennella Has Standing as an Election Inspector.

This case may independently proceed with Mennella as plaintiff because Mennella also has standing. "At the pleading stage, general allegations of injury are sufficient to withstand a motion to dismiss because it is 'presumed that general allegations embrace those specific facts that are necessary to support the claim.'" *Dover Historical Soc'y*, 838 A.2d at 1110 (*quoting Lujan*, 504 U.S. at 561). Such general allegations are sufficient where they "support a reasonable inference" of some "'concrete and actual invasion of a legally protected interest[].'" *Hall v. Coupe*, No. 10307-VCS, 2016 Del. Ch. LEXIS 80, at *6 (Del. Ch., May 25, 2016) (quoting *Reeder v. Wagner*, 974 A.2d 858 (Del. 2009)). Mennella's allegations, which the Department simply ignores, satisfy these standards.

a. Early Voting Laws

The Department argues that Mennella lacks a cognizable injury because he does not allege that he "will be affected by early voting or voters' permanent absentee status." Department Brief at 19. Not true. Mennella alleges that he "plans to serve as an inspector of elections at the 2024 General Election and at other future

elections." A012 ¶¶ 8, A022 ¶ 48. Absent relief, the 2024 General Election will be conducted using early voting sites, A024 ¶ 57, which, as the Department acknowledges, will be operated in the same way as Election Day voting sites, A046 ("Early voting is conducted using the same procedures as set forth in Chapter 49 of the Election Laws"); *see also* 15 *Del. C.* § 5405 ("Except as otherwise provided under this chapter, the procedure for early voting is as established under Chapter 49 of this title.")). Necessarily, Mennella's plans include service at early voting sites, where he will be forced to choose between his official duties and the Delaware Constitution.

Mennella alleges that early voting is not permitted under the plain language of the Delaware Constitution. *E.g.*, A023 ¶ 53. Yet he must by law and oath prepare, open, and administer voting at early voting sites, 15 *Del. C.* § 4912; 15 *Del. C.* § 4931, and "cause the ballots that shall be taken at such election to be fully read and ascertained," 15 *Del. C.* § 4904. Inspector Mennella is placed in the untenable and perilous position of choosing between Delaware's Constitution which precludes early voting, and his oath—which requires him to "perform every act and duty by law required of [him] … truly, faithfully, and impartially…." 15 *Del. C.* § 4904. If Mennella refuses to administer the election at early voting sites—because he believes such sites to be unlawful—he faces fines and even prison time. 15 *Del. C.* § 5126; 15 *Del. C.* § 5112. His injuries are self-evident.

The Department's position that Mennella may consider only limited voter-eligibility issues, Department Brief at 19, is refuted by his statutory oath, which forbids his receipt of the vote of "any person whom [he] shall believe not entitled to vote," 15 *Del. C.* § 4904. While he may be overruled by the majority vote of his "associates," *id.*, Mennella remains personally bound to faithfully "perform every act and duty by law required of [him]," *id*. Following the Constitution—which he believes he must do—means rejecting early votes, transgressing his oath, and enduring the consequences.

In any event, the success or failure of Mennella's actions does not determine whether he has complied with state law. The character of Mennella's actions—*i.e.*, whether he acted unlawfully—would not change. Similarly, it does not matter whether Mennella has unilateral power to reject any votes. Mennella, and no one else, "mak[es] the proclamation that the election is open." 15 *Del. C.* § 4931. He alone thus makes the decision to permit early voting.

To the extent the Department is arguing that Mennella's injuries are not particularized, *see* Department Brief at 19, that is, of course, plainly untrue because the public at large does not serve as inspectors of elections and therefore the public at large does not share Mennella's duties or his dilemma.

Drawing all "reasonable inferences in the plaintiff's favor"—as this Court must at this stage, *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168

(Del. 2006)— Mennella has pleaded a plausible connection to the Early Voting Laws.

b. Permanent Absentee Voting Law.

For similar reasons, Mennella has standing to challenge Delaware's Permanent Absentee Voting Law. The Department's disagreement is built on nothing more than its belief that "absentee voters, by definition, do not appear at the polling place." Department Brief at 19. To the contrary, Registrants who are qualified to vote absentee, including permanent absentee, may return their voted ballots to polling places on Election Day. Mennella must receive and treat all absentee ballots as validly cast, 15 *Del. C.* § 4904 ("I will cause the ballots that shall be taken at such election to be fully read and ascertained"), and may not "[e]xclude[] any vote duly tendered,"15 *Del. C.* § 5130. Mennella must therefore choose between the oath he swore to accept and count votes cast by registrants in permanent absentee status and the Delaware Constitution's strict requirements on absentee voting. If he chooses the Constitution, Mennella faces fines and prison time. 15 *Del. C.* § 5126; 15 *Del. C.* § 5112. This dilemma confers standing on Mennella.

3. Hocker and Mennella Have Standing as Voters.

Separately, Hocker and Mennella have standing due to the harm each faces as a voter. *See* A023 ¶ 52, A024 ¶ 63, A026 ¶ 73. The Chancery Court's decision in *Higgin* is instructive on this point because it refutes the same arguments the

Department makes here. In *Higgin*, the Department argued that the plaintiffs' vote dilution and vote cancellation claims were too generalized to establish standing to challenge the constitutionality of Delaware's Vote-by-Mail statute. *Higgin*, 2022 Del. Ch. LEXIS 232, at *27. The Chancery Court disagreed,[3] remarking that "[w]hen made by the Department of Elections, this argument is, at best, ironic. From a standing standpoint, it makes little sense." *Id*. Simply put, the Chancery Court held that in their capacities as voters, "Plaintiffs' injuries are not generalized" because "[t]he harm to voters who do comply with the requirements for voting under the Delaware Constitution is distinct from the harm to voters who do not. The harm may be shared by all the members of the compliant group, but it is no less personal to each group member." *Id*. at *28. For this reason, the Chancery Court held that "Plaintiffs have standing to challenge the Vote-by-Mail Statute." *Id*. at *32.

The Chancery Court explained that its decision was consistent with this Court's decision in *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103 (Del. 2003), in which this Court encountered and rejected "the same generalized grievance argument Defendants make here." *Higgin*, 2022 Del. Ch. LEXIS 232, at *29.

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[3] The Chancery Court first found that plaintiffs' alleged injuries as voters were injuries in fact. *Higgin*, 2022 Del. Ch. LEXIS 232 at *26-27.

That Court also found that "[p]ublic interest considerations likewise undermine Defendants' position." *Higgin*, 2022 Del. Ch. LEXIS 232, at *31.

> If I were to adopt Defendants' argument on standing, I would endorse a scenario where the legislature could, by simple majority, adopt voting laws in violation of the Delaware Constitution that no Delaware citizen can challenge because the harm of such laws would be 'generalized' to all Delaware voters. For a host of reasons, that seems unwise.

Id. at *31. Those considerations apply equally here.

In short, the Chancery Court's decision in *Higgin* prudently recognizes that "injuries to fundamental rights—*e.g.*, voting—even when shared, may be sufficiently particular and concrete to confer standing on an individual voter." *Higgin*, 2022 Del. Ch. LEXIS 232, at *28; *see also Howell v. McAuliffe*, 788 S.E.2d 706, 714 (Va. 2016) (finding that voters had standing to challenge "unconstitutional manipulations of the electorate, and remarking, "[T]he relevant comparison here is between a statewide electorate packed with 206,000 disqualified voters and one without them. Every qualified voter (though not every member of the general public) suffers the same vote-dilution injury."). Hocker and Mennella face the same concrete and particularized voting-related injuries that were found sufficient to support standing in *Higgin*. *See* A024 ¶ 73 ("Plaintiffs are also harmed as Delaware voters

because their votes would be diluted by illegally cast ballots.”). Hocker and Mennella therefore have standing as voters.[4]

[4] This Court found it unnecessary to address voter-standing in *Higgin*, 295 A.3d at 1088 n.157, and thus did not disturb the Chancery Court’s holding.

II. Plaintiffs Have Alleged a Sufficient Conflict Between the Delaware Constitution and Delaware's Early Voting Laws.

A. Question Presented

Did the Superior Court correctly hold that Plaintiffs alleged a clear and convincing conflict between the Early Voting Laws and Article V, Section 1 of the Delaware Constitution?

B. Scope of Review

This Court reviews constitutional claims *de novo*. *Higgin*, 295 A.3d at 1085.

C. Merits of Argument

The Superior Court correctly held that the Early Voting Laws clearly and convincingly violate Article V, Section 1 of the Delaware Constitution because they plainly expand Election Day beyond the Constitutionally designated day. Exh. A at 15-19. The Department's arguments to the contrary depend on an inapt decision of the United States Supreme Court involving federal Election Day statutes, *Foster v. Love*, 522 U.S. 67 (1997). *Foster*—which *invalidated* an early voting scheme—should not be viewed as authoritative on an issue it did not address, namely, the meaning of Delaware's Constitution. Regardless, the Superior Court's decision is consistent with *Foster* and the drafters' intent and avoids absurd results.

While the General Assembly enjoys broad lawmaking power, "[i]t is axiomatic that the State cannot ignore our Constitution[.]" *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 653 (Del. 2017). This Court is clear: "The ability

of the General Assembly to promulgate legislation on behalf of the citizens of Delaware is limited by the strictures of the Delaware Constitution." *Republican State Comm. v. Delaware*, 250 A.3d 911, 916-17 (Del. Ch. 2020).

Interpreting the Delaware Constitution "begin[s] with the text of the Constitution." *Bridgeville Rifle & Pistol Club, Ltd.*, 176 A.3d at 642. The text "means what it plainly says, no matter what the effect may be. To give it a different meaning would be … judicial legislation." *State ex rel. Southerland v. Hart*, 129 A. 691, 694 (Del. 1925). Importantly, and "[o]bviously, no presumption springing from theory may be permitted to override the clear meaning of the written document from which it is drawn." *Du Pont*, 85 A.2d at 728.

As the Superior Court found, the text of the Delaware Constitution controls this case. Even if ambiguity exists, reason, context, and history compel that it be resolved in Plaintiffs' favor.

1. The Early Voting Laws Conflict with the Constitution's Plain Language.

Article V, Section 1 reads, in relevant part: "The general election shall be held biennially on the Tuesday next after the first Monday in the month of November, and shall be by ballot[.]" This sentence "means what it plainly says": the general election shall be *on* a specific Tuesday. *Hart*, 129 A. at 694. The Early Voting Laws conflict with Article V, Section 1 because they allow the election to occur *on* ten separate days. 15 *Del. C.* § 5402. In the Superior Court's words, "The conflict

between these two passages is obvious." Exh. A at 16. The statute must therefore give way to the Constitution. *Hart*, 129 A. at 694.

A historical examination of the Delaware Constitution supports the Superior Court's interpretation. *See Higgin*, 295 A.3d at 1069 ("[W]e take our bearings from the historical context in which the relevant constitutional provisions were adopted, interpreted, and, from time to time, amended."). The 1776 Delaware Constitution provided that, "[t]he first election for the general assembly of this State shall be held on the 21st day of October next, at the court-houses in the several counties, in the manner heretofore used in the election of the assembly[.]" Del. Const., Art. 27 (1776). Because the "election" was to occur on one specific day and at specific places ("the court-houses"), it could not have occurred earlier in time, or anywhere else. *See Higgin*, 295 A.3d at 1070 ("That the framers of the 1776 Constitution intended to perpetuate the in-person voting requirements is further evidenced by Articles 27 and 28 of the document."). Delaware's first Constitution provided an even more specific time for the choosing of "assessors," which were chosen "on the morning of the day of the election." *Id*.

The 1776 Constitution provided further that subsequent elections would also occur on one specific day: "the 1st day of October in each year forever after." *Id*. Notably, the Constitution forbid elections and meetings of the general assembly to occur on Sundays, providing that "if any of the said 1st and 20th days of October

should be Sunday, then, and in such case, the elections shall be held, and the general assembly meet, the next day following." *Id*.

The 1792 Delaware Constitution retained the requirement that the election occur on one day: "the first Tuesday of October." Del. Const., Art. II, § 2 (1792) (setting the day for election of representatives); Del. Const., Art. III, § 2 (1792) (setting the day for election of the governor). Importantly, eligibility for voting was contingent on the time each man had resided in the state ("two years next before the election") and had paid taxes ("assessed at least sixth months before the election"). *Id*., Art. IV, § 1 (1792), giving the specificity of the date of the election clear significance.

The 1831 Delaware Constitution was amended in 1855 to provide, "All elections for governor, senators, representatives, sheriffs, and coroners shall be held on the second Tuesday of November[.]" Del. Const., Art. IV, § 1 (1831). The residency requirement remained but was shortened to "one year next before the election." *Id*.

The 1897 Delaware Constitution—the version currently in effect—retains the requirement the general election occur on one specific day: "The general election shall be held biennially on the Tuesday next after the first Monday in the month of November, and shall be by ballot[.]" Del. Const., Art. V, § 1 (1897). The current Constitution also contains exact standards by which to judge eligibility to vote:

> Every citizen of this State of the age of twenty-one years who shall have been a resident thereof **one year next preceding an election**, and for the last **three months** a resident of the county, and for the last **thirty days** a resident of the hundred or election district in which he or she may offer to vote, and in which he or she shall have been duly registered as hereinafter provided for, shall be entitled to vote at such election in the hundred or election district of which he or she shall at the time be a resident, and in which he or she shall be registered, for all officers that now are or hereafter may be elected by the people and upon all questions which may be submitted to the vote of the people[.]

Id., Art. V, § 2 (1897) (emphasis added).

These exact standards do not make sense if the drafters believed voting could begin at *any time* prior to Election Day. Consider the requirement that voters reside in Delaware at least one year "preceding an election." Del. Const., Art. V, § 2 (1897). An individual who began residing in Delaware exactly one year before "the Tuesday next after the first Monday in the month of November" would not meet this durational requirement until Election Day. Under the Department's interpretation, the same individual could nonetheless "early vote" up to 10 days before he met the durational requirement. Such a result renders the Constitution's durational residency requirement meaningless in some cases.[5]

Indeed, such an interpretation could produce absurd results. For example, a individual who began residing in Delaware one year and ten days before the

[5] The durational residency requirement is textually concerned with the individual act of voting, not the collective selection of an office holder. *See* Del. Const., Art. V, § 2 (1897) (explaining the those meeting the residency requirements "shall be entitled to vote at such election").

election, could utilize the entire early voting period, where as an individual who began residing in Delaware one year and two days before the election, could utilize just two days of early voting. Reading the Constitution to mean what it says avoids these problems.

Lending further support to the Superior Court's view are the last five words of the first clause—"and shall be by ballot." Del. Const. Art. V, § 1. These words demonstrate that the principal focus of Article V, Section 1 is voting. This qualification would make little sense if the term "election" meant all combined actions of voters *and* officials necessary to make a final selection, as the Department claims.

2. *Foster v. Love* Does Not Compel a Different Outcome.

The Department's counterargument includes no historical analysis of the Delaware Constitution. The Department argues this Court should ignore such history entirely and instead find dispositive meaning in a United States Supreme Court case interpreting federal statutes— *Foster v. Love*, 522 U.S. 67 (1997). *Foster* is neither dispositive of the question before this Court, nor is it inconsistent with the Superior Court's decision.

Foster did not involve the Delaware Constitution or any state's constitution. *Foster* involved the federal Election Day statute. *Foster*, 522 U.S. at 69 ("The issue

before us is whether such an ostensible election runs afoul of the federal statute.”). Even a cursory review demonstrates *Foster* is inapposite.

Furthermore, *Foster* did not approve early voting. Quite the opposite. *Foster* invalidated a Louisiana early voting scheme that allowed federal elections to be finalized before federal election day. *See Foster*, 522 U.S. at 68-69.

The more pertinent authority is *Lamone v. Capozzi*, 912 A.2d 674 (Md. 2006), a 2006 decision by the highest court in Delaware’s neighboring state of Maryland. *Capozzi* considered the very conflict before this Court: whether Maryland’s early voting scheme conflicted with the Maryland Constitution. *Id*. at 675.

The Maryland Constitution, much like Delaware’s, provided, “‘All general elections in this State shall be held on the Tuesday next after the first Monday in the month of November, in the year in which they shall occur.’” *Capozzi*, 912 A.2d at 675 (*quoting* Md. Const. Art. XV, § 7). In 2006, Maryland’s General Assembly enacted early voting statutes, and registered voters challenged the law, alleging the statutes conflicted with the state’s constitution. *Id*. at 681.

The State of Maryland argued that early voting was not inconsistent with the constitution because an “‘election’ is not singularly the ‘casting of a ballot,’ … but, rather, it is, as articulated by *Foster v. Love*, 522 U.S. 67, 71, 118 S. Ct. 464, 467, 139 L. Ed. 2d 369, 374 (1997), ‘the combined actions of voters and officials meant

to make a final selection of an office holder.'" *Capozzi*, 912 A.3d at 687. The Court disagreed, finding it "clear" from the Maryland Constitution's language that the election shall be held "*on*" one specific day, and further remarking that "apart from absentee voting, in-person ballot casting must begin and end on the same day. Thus, any statute that allows for a ballot to be cast before the prescribed day must be in derogation of the Constitution." *Id*. at 691.

The Maryland Court of Appeals found *Foster* unhelpful and distinguishable. The court prudently observed that the definition *Foster* assigned to "election" was "employed to ensure that federal offices were not filled by elections finalized before the federal election day." *Id*. at 688. The court found that "election" as used in the Maryland Constitution was not inconsistent with *Foster*'s definition of "election" because the Maryland Constitution simply requires "the combined actions of voters and officials meant to make a final selection of an officeholder" to occur on one day. *Id*. at 692.

The Maryland Court of Appeals ultimately concluded that "[e]arly voting … fundamentally *changes* the very principles established in the Constitution." *Id*. at 687 (emphasis in original). The same is true here. The Delaware Constitution has always fixed the day of the general election on one specific day. The Early Voting Laws fundamentally change Delaware's constitutional arrangement and thus cannot stand.

3. Absentee Balloting Is a Constitutionally Authorized Exception to In-Person Voting on Election Day.

The Department points to absentee voting as evidence that the Delaware Constitution "permits some voting to take place before [election] day." Department Brief at 27-28. In reality, citing to the absentee voting provisions, which were made by constitutional amendment, undermines the Department's entire argument because it demonstrates that changes to constitutional norms must be made through constitutional amendment.

This Court confirmed in *Higgin*, "[A]t the founding of 'The Delaware State,' our constitution required voters to cast their ballots in person." *Higgin*, 295 A.3d at 1071. The General Assembly attempted to authorize absentee voting via statute in 1923, but this attempt was found to violate the Delaware Constitution in *State v. Lyons*, 40 Del. 77 (1939) ("[I]t is the plain duty of the Court to hold the statute unconstitutional, leaving the perfection of the statue to be brought about by proper constitutional amendment."). In *Higgin*, this Court explained, "Two years after *Lyons* struck down the 1923 Act, the 108th Session of the General Assembly heeded the Court of General Session's reproof and approved a constitutional amendment, adding Section 4A to Article V of the Delaware Constitution." *Higgin*, 295 A.3d at 1076.

Absentee voting is thus a constitutionally permissible exception to the default rule that voting must occur in person on Election Day. Absentee voting's

history demonstrates that changes to the default rule must be made through the amendment process, not by legislation. Absentee voting supports the Plaintiffs, not the Department.

4. Early Voting Is not a Means, Method, or Instrument of Voting as Those Terms Are Used in the Constitution.

The Superior Court held that early voting is a "method of voting" under Article V, Section 1, but is still not constitutionally authorized because it was not enacted "so as best to secure secrecy and the independence of the voter, preserve the freedom and purity of elections and prevent fraud, corruption and intimidation thereat." Del. Const., Art. V, § 1. The Superior Court's judgment is correct (and should be affirmed), but its reasoning is only partly correct. Early voting fails both constitutional requirements because it is also not a "mean, method, or instrument of voting."

Early voting is conducted in the exact same way as voting on Election Day—in person and by ballot. *See* A024 ¶ 57; A046 ("Early voting is conducted using the same procedures as set forth in Chapter 49 of the Election Laws.") (citing 15 *Del. C.* § 5405). What, then, is different about it? When it occurs—*i.e.*, the *time*.

Doing the same act at a different time does not change the mean or method of the act. Consider your commute to work, for example. If you drive a car to work and leave at 8:00 am, your *means* of transportation is "car" and your departure *time* is "8:00." If you decide to drive your car to work at 9:00 am, your departure *time*

has changed, but your *means* is still “car.” If, however, you decide to walk to work, your *means* has changed from “car” to “walking.” Whatever you choose as your *means*, your departure *time* is a separate matter entirely.

Early voting and voting on Election Day are both the “car” in this analogy because they are by law the same act performed in the same way. The only thing different about early voting and voting on Election Day is the *time* each act occurs.

The title of Article V, Section 1 leaves no doubt that the Constitution’s drafters viewed *time* as a separate matter from a “mean, method, or instrument of voting.” The title—“Time and manner of holding general election”—textually separates “time”—(when voting occurs)—from the “manner” of holding the election—(where and how the votes are cast). The Department’s position that early voting is nothing more than a “manner” of voting is refuted by the text and structure of Article V, Section 1.

The Department nonetheless argues that “in common parlance, the ‘method’ of taking some act can include when the act is performed.” Department Brief at 33. The Department offers no examples or credible support for this statement. *Id*. This Court is not dealing with hypotheticals or the universe of “common parlance.” This Court is interpreting very specific language that has fixed Election Day on one specific day for centuries.

The examples that do exist refute the Department's interpretation. In *People ex rel. Deister v. Wintermute*, 194 N.Y. 99, 104, 86 N.E. 818, 819 (1909), the court explained that the phrase "other method as may be prescribed by law" was added to the constitution "solely to enable the substitution of voting machines."

Also consider Pennsylvania's election day article, which provides,

> The general election shall be held biennially on the Tuesday next following the first Monday of November in each even-numbered year, **but the General Assembly may by law fix a different day**, two-thirds of all the members of each House consenting thereto: Provided, That such election shall always be held in an even-numbered year.

Pa. Const. Art. VII, § 2 (emphasis added). There are thus much clearer ways to authorize lawmakers to change the day of the election. Yet no such language exists in Delaware's Constitution.

The Constitution's text, structure, and history all support Plaintiff's interpretation. This Court should clarify that "mean, method, and instrument of voting" does not include the "time" when voting occurs.

5. Early Voting Does Not Best Secure Secrecy or the Independence of the Voter, or Preserve the Freedom and Purity of Elections, or Prevent Fraud, Corruption and Intimidation.

Even if early voting is a "mean, method, or instrument of voting" it would still not be constitutionally authorized because it does meet the Constitution's criteria for such a prescription. *See* Del. Const. Art. V, § 1.

Before the Superior Court, the Department took the position that "Early Voting Statute is compliant with our Constitution because it is not less secure than traditional voting on election day." Exh. A at 20. This reasoning, as the Superior Court found, does not "articulate how Delaware's Early Voting Statue accomplishes Article V, Section 1's mandate." *Id*.

The Department fares no better before this Court. The Department first claims that the Early Voting Laws are "self-evidently designed to relieve burdens on the voting system and to increase access to voting." Department Brief at 34. Therefore, the Department reasons, the Early Voting Laws "help[] "preserve the freedom and purity of elections." *Id*. For starters, the Department's argument ignores the constitution's threshold phrase "so as best to," which the Superior Court prudently acknowledged acts as a limit on the General Assembly's power. Exh. A at 20. Instead, the Department lowers its standard, arguing that the Early Voting Laws are valid because they "help[]" achieve the mandated ends. Department Brief at 34. Even under its own standard, the Department does not explain how such relieved burdens and increased access "preserve[s] the *freedom* and *purity* of elections." Nor it is self-evident that early voting relieves burdens. Expanding Election Day from one day to ten days requires more staff, more security, and more expenses. To find that laws merely *intended* to increase *access* to voting satisfy Article V, Section 1's standard would effectively expand a very

careful written limitation into license for the Generally Assembly to rewrite voting laws whenever a majority imagines that access could even marginally improve.

The Superior Court correctly concluded that "the Early Voting Statute was not enacted 'so as best to' nor does it achieve the ends required of a method of voting enacted by the General Assembly under Article V, Section 1." Exh. A at 20. The Superior Court's ruling gives meaning to the Constitution's language and the drafters' intent that the relevant language operate as a limitation on legislative power.

III. PLAINTIFFS HAVE ALLEGED A SUFFICIENT CONFLICT BETWEEN THE DELAWARE CONSTITUTION AND DELAWARE'S PERMANENT ABSENTEE VOTING LAW.

A. Question Presented

Did the Superior Court correctly hold that Plaintiffs alleged a clear and convincing conflict between the Permanent Absentee Voting Law and the Article V, Section 4A of the Delaware Constitution?

B. Scope of Review

This Court reviews constitutional claims *de novo*. *Higgin*, 295 A.3d at 1085.

C. Merits of Argument

The Superior Court correctly held that the Permanent Absentee Voting Law clearly and convincingly violates Article V, Section 4A of the Delaware Constitution because the Law grants absentee voting privileges indefinitely and without consideration of the registrant's eligibility at each general election. The Department appears to concede the textual conflict between the statute and constitution, but nevertheless asks the Court to uphold the statute based on the "presumption" that eligible absentee voters will remain eligible in subsequent years. *See* Department Brief at 36 (explaining that the Permanent Absentee Voting Law "establishes a presumption that certain voters whose absentee eligibility is particularly likely to endure may vote absentee until their eligibility changes"). Yet "no presumption springing from theory may be permitted to override the clear

meaning of the written document from which it is drawn." *Du Pont*, 85 A.2d at 728.

"The right to cast an absentee ballot is limited by our state constitution … and constitutional limits cabin legislative freedom." *Republican State Comm.*, 250 A.3d at 913. The Constitution's Article V, Section 4A "specifically enumerates the classifications of persons eligible to vote by absentee ballot at general elections." *Op. of Justices*, 295 A.2d 718, 722 (Del. 1972). Fifty years ago, the Delaware Supreme Court held that "[i]t is beyond the power of the Legislature … to either limit or enlarge upon the § 4A absentee voter classifications specified in the Constitution for general elections." *Id*. This Court affirmed this limit on legislative power in *Higgin*, where it invalidated the General Assembly's attempt to expand absentee voting privileges to all Delaware registrants. The Court: "The Vote-by-Mail Statute runs counter to a time-honored understanding shared by our courts, the General Assembly, and the Department, that the General Assembly is not free to limit or enlarge upon the categories of citizens specifically enumerated in Section 4A who need not vote in person in general elections." *Higgin*, 295 A.3d at 1069.

This Court has attached one additional limitation to the General Assembly's authority: "[I]t is certainly the duty of the General Assembly, in enacting an

absentee voters' law, to take all possible precaution against fraudulent abuse of the privilege." *State ex rel. Smith v. Carey*, 112 A.2d 26, 28 (Del. 1955).

The General Assembly may provide for absentee voting only by those who "shall be unable to appear … at the regular polling place." The word "shall" is a term of certainty, used in laws and regulations to express what is mandatory. None of the provisions allowing a registrant to vote absentee is one that will exist in perpetuity. Yet that is precisely what the Permanent Absentee Voting Law—and the Department—presumes and permits.

Delaware's statutes providing for permanent absentee status conflict with and violate the Delaware Constitution because they grant eligibility to vote by absentee ballot indefinitely, without consideration of the applicant's eligibility at each election. In the Superior Court's words, "At each future election the Department of Elections requires no further affirmation that the voter is still in a situation that would require them to cast an absentee ballot." Exh. A at 23-24.

By granting *indefinite* absentee voting privileges to anyone who is "unable" to vote in person at a *single* election (perhaps many years ago), the General Assembly has legislated outside the bounds of the Section 4A's text, and effectively enlarged the pool of eligible absentee voters, in contravention of *Op. of Justices*, 295 A.2d 718, 722 (Del. 1972) and *Higgin*, 295 A.3d at 1080 ("Over the next 50 years, the General Assembly adhered to the understanding—developed by

the Delaware judiciary in *Lyons*, *Harrington*, and the 1972 *Opinion of the Justices*—that the General Assembly could only add absentee-voter classifications through the constitutional-amendment process.”).

As the Superior Court found, Exh. A at 23, additional language used in Section 4A also supports the Plaintiffs’ interpretation. It provides that a registered and qualified elector “may cast **a** ballot at **such** general election to be counted in such election district.” (emphasis added). The use of singular descriptors is further evidence that the drafters envisioned and intended that eligibility to vote by absentee ballot would be evaluated and confirmed at *each* general election.

Further support is found in the very nature of the reasons one may apply to vote absentee. Each of the reasons involves a temporary or transitory circumstance, which over time may change. Vacation, work requirements, illness, military service, or disability are not permanent circumstances. Thus, permanent status is by its very terms in contravention of the reasons one may vote absentee.

As *Higgin* affirmed, the default rule in Delaware is in-person voting. *Higgin*, 295 A.3d at 1071 (“Thus, at the founding of ‘The Delaware State,’ our constitution required voters to cast their ballots in person.”). The Permanent Absentee Voting Law fundamentally alters the default rule. Upon a single application for an absentee ballot, the Law makes voting *in absentia* the default rule.

The Department concedes that the entire scheme depends on a "presumption," Department Brief at 39, and that the Department places the duty on voters to confirm they are *ineligible* to vote absentee, which the Department describes as "revers[ing] the ordinary presumption that a voter *will* be able to appear in person to vote in future elections absent a contrary notification," *id*. That reversal is precisely what makes the Law unconstitutional. Furthermore, passive policing of absentee voting privileges conflicts with this Court's requirement that the General Assembly "take all possible precaution against fraudulent abuse of the privilege." *Carey*, 112 A.2d at 28. "All possible precautions" requires an attestation of absentee voting eligibility at *each* election.

The drafters of Article V, Section 4A wrote with precision. Only registrants experiencing a limited set of circumstances are exempt from in-person voting on Election Day. The General Assembly's scheme is the opposite of precise. It depends on "presumption," chance (undeliverable mail), and the wide-spread mindfulness (request by registrants to cancel) of more than 20,000 Delawareans to work correctly. 15 *Del. C.* § 5503(k)(3). The conflict here is thus not just one of text, but of purpose and spirit.

For these reasons, the Superior Court's holding should be affirmed.

CONCLUSION

No matter the spirit and goals of the Early Voting Laws and the Permanent Absentee Voting Law, these enactments conflict with the Delaware Constitution and must be declared invalid. For the foregoing reasons, Plaintiffs respectfully request that this Court affirm the Superior Court's declaratory judgment.

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Respectfully submitted,

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